Supreme Court, U.S.
FILED
APR 8 1993
OFFICE OF THE CLERK

No. 92-6033

In The

Supreme Court of the United States

October Term, 1992

WILLIAM MCNEIL,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

ALLEN E. SHOENBERGER
(Appointed by this Court)

Loyola Law School
One East Pearson Street
Chicago, Illinois 60611
(312) 915-7141

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether an incomplete filing of a Federal Tort Claims Act suit may be perfected by filing a notice of final agency denial of the claim prior to substantial progress on the merits?

II. May the United States government bar a Federal Tort Claims Act suit when a *pro se* prisoner files a premature suit, but satisfies the Congressional requirement – that the claim be presented to and denied by the agency before it is heard by the court – by filing a final agency denial of the claim prior to any substantial progress on the merits of the case, and, in so doing, requests the court to "commence his legal action?"

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STATEMENT OF FACTS

The statement of facts by the Acting Solicitor General contains serious inaccuracies.

It is simply not true that "Petitioner did not present an administrative claim to the agency prior to filing suit in the district court." Acting Solicitor General's Brief (hereinafter Sol.Gen.Br.), p.2. Moreover, Mr. McNeil informed both the seventh circuit as well as the district court that he had filed an administrative claim prior to filing suit.[1]

The argument made at page 8 of the Acting Solicitor General's brief is quite incorrect that, "Petitioner has satisfied neither condition [presentation and final denial]. . . . " Presentation certainly took place; the agency knew it had a claim and said so. (Jt. App. 17)

Petitioner did "argue in the court of appeals, [and] in this Court, that his letter to the USPHS should have been treated as an administrative claim." (Sol.Gen.Br., p.2, n.1) *See* Mr. McNeil's Pro Se initial and reply briefs in the court of appeals. (App. A) The initial brief by counsel for

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[1] See Jt. App. 10 re notice in district court. The Acting Solicitor General's brief n.1, p.2 admits that the FDA advised Mr. McNeil that his letter was being sent to a CLAIMS officer. Nowhere in the record is there a statement that Mr. McNeil's claim had been reclassified as a FOIA request in lieu of a claim. In fact, Mr. McNeil had sent the administrative agency another letter, a FOIA request along with his initial claim. (The FOIA letter was filed with his complaint as part of item # 1 in the district court record.)

Mr. McNeil apparently believed he was required to sue within six months of his January 17, 1989 claim. See Pro Se Brief, App. A, "damn if you do and damn if you don't."

Mr. McNeil in the court of appeals also stated that a claim was filed in January, 1989.[2]

Mr. McNeil's pro se reply brief[3] reinforced these same points: he filed his claim with the administrative agency; he thought the claim had been denied; he then filed suit. In response to receiving a form #95, he sent a second claim; it too, was denied. (App. A)

Each of these matters was clearly raised in this court. *See* Pet. Brief p. 2, Pet. for Cert., p. 3. Neither waiver[4] nor any failure to present to this court has occurred.

Moreover, Mr. McNeil paid the filing fee more than a year before the Acting Solicitor General asserts he did (not as an obviously incorrect docket entry indicates, an entry relied upon by the Acting Solicitor General's brief p. 3).[5]

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[2] Initial brief, pp. 3-4. Indeed, note 1, p. 4 makes clear that *two claims had been made*, but stated it was unclear in the record whether the July 21, 1989 denial letter addressed the January 17, 1989 or the July 7, 1989 claim. "What is known with certainty, is that by July 21, 1989 McNeil had gained the right to sue in federal court." It was also suggested that August 7, 1989 was the date of filing a cause of action in federal court which should "act as the date of filing for purpose of determining the limitations period." (p. 7) (See also *Id.* p. 8. note 2.)

[3] This pro se reply brief was itself mislaid (unfortunately an all too common occurrence for Mr. McNeil's court filings) and located only subsequent to the grant of certiorari in this case.

[4] Petitioner's Brief in this court stated, "[H]is suit should proceed either because that [August] filing constituted a new filing, or alternatively, a filing that perfected his original court filing." (p. 7). This contradicts the statement, "[P]etitioner does not contend that his letter can be characterized as the initiation of a new civil action." Sol.Gen.Br. p. 12, n.4.

[5] *See*, Exhibit B to this brief, and Jt. App. 1, docket entry for April 25, 1990 "Copy of receipt for payment of filing fee.

ARGUMENT

Mr. McNeil submitted his claim to the administrative agency as required by law, and multiply exhausted the administrative remedy long before the government has any colorable claim that it had been prejudiced. Every expressed Congressional purpose has been fulfilled, for the agency both considered and rejected his claim.[6]

The Acting Solicitor General's brief ignores the extensive statutory history discussed in Mr. McNeil's brief at pp. 15-32, that gives context to the FTCA as part of a major reform of *Congress*. The *Westfall* amendment is not inconsistent with the arguments advanced in Petitioner's brief, but supports that analysis: the FTCA was a remedial statute intending to replace private bills with judicial remedies that were to be the *same* as those available in suits between private parties. Sovereign immunity was *waived* in 1946. Not a shred of legislative history cited by the Acting Solicitor General suggests any intent to retract that 1946 waiver.[7] Exhaustion can properly be considered

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(Temporarily unavailable for docketing)", and also n. 3, p. 4, Pet. Brief in this court. The district court docket entry suggests the original receipt may never have been located. Moreover, the docket entry is dated incorrectly. The entry date of 4/25/90 purports to reflect a document it states was filed 5/15/90 (twenty days later). The next docket entry reflects the court's order of 4/20/90. Mr. McNeil's rights should not be lost by obvious clerical mistakes.

[6] Alternatively, six months had passed from the first filing, and/or Mr. McNeil had been mislead by the agency communications into filing suit.

[7] *Smith v. United States*, 113 S.Ct. 1178, No. 91-1538 (March 3, 1993) is not to the contrary, for the issue in *Smith* was the scope of an explicit textual refusal to waive in 1946. 28 U.S.C. sec. 2680(k)

a condition precedent to recovery, but not jurisdiction to proceed.

Hallstrom v. Tillamook County, involved dissimilar legislation with quite different legislative reasons for conditioning suit upon prior notice, including most importantly a desire that governmental bodies be primarily responsible for enforcing complex federal environmental statutes. Such a purpose could not be served by notice after filing suit. The Congressional purposes of the FTCA administrative claim requirement, however, can all be served by a rule that permits exhaustion as long as it predates substantial progress.

Federal Rule of Civil Procedure 15(d) provides in any case that Mr. McNeil's August letter properly permitted the litigation to proceed.

I. The *Westfall* Amendment Supports no Narrow Construction of the FTCA, but Instead Supports a Practical Approach

Neither the text of the *Westfall* Amendment[8] nor its legislative discussion refers to *completion* of the agency consideration of a claim. Nothing in the legislative history suggests failure to exhaust prior to filing suit

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See also Rep. Owens' statement two weeks after this court's decision of *Westfall*. "When Congress enacted the FTCA it thought that it was abolishing the sovereign immunity doctrine. . . . " Congressional Record, House, 100th Cong. 2nd Sess. H 28, January 27, 1988.

[8] *Westfall v. Erwin,* 484 U.S. 292 (1988). Pub. L. 100-694. The argument regarding the last sentence of section 2675(a) (Sol.Gen.Br. 11) is not well taken for each of the cases mentioned are by definition already in court, indeed many because the Federal Government initiated suit.

undercuts the validity of a good faith court filing. *See,* Pet. Brief, p. 24, n.22.

The Acting Solicitor General's brief cites a single 1988 reference to legislative history for the proposition that section 2675 is jurisdictional.[9] That citation is misleading for the reference was to "Persons who have initiated a lawsuit but never *submitted an administrative claim to the Government*[10]" (emphasis added). It refers to neither receipt of a sum certain denial letter, nor to 6 months passing. The reference thus has absolutely nothing to do with Mr. McNeil's situation.[11] Indeed, the remainder of the referenced paragraph reiterated Congress's persistent, and oft repeated FTCA purpose, ensuring access to courts for claims against the federal government the *same* as for suits against private defendants.[12]

Moreover, the attempt to analogize between Congress's consideration of the *Westfall* amendment and the

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[9] A brief half line footnote reference. See, House Report 100-700, 100th Cong. 2nd Sess. (June 14, 1988) at p. 8.

[10] Id. The text immediately continues: "will not lose their right to pursue a lawsuit for having failed to submit such a claim. Instead, as long as their suit was timely under state law when it was filed, they will have at least 60 more days to file a timely administrative claim."

[11] Compare, *Knapp v. U.S.,* 844 F.2d 376, 379-80 (6th Cir. 1988) (VA entitled to refuse to negotiate with "improper representative," refusal had no impact on court jurisdiction).

[12] Indeed, the purpose of the Westfall amendment included relief of pressure on Congress, pressure in the form of suits against Congressional employees or officers. See p. 3, H.R. 100-700: *Westfall* affects "officers and employees of all three branches."

deliberate Congressional decision to exempt certain environmental lawsuits from the waiting period is defective, for the two Congressional actions are quite dissimilar.

In the environmental area, Congress expressly considered whether in certain limited cases a private attorney general's suit against an alleged polluter could bypass the 60 day waiting period after notice. Congress decided to permit limited bypasses but in most cases preferred that the private attorney general try to prod the government to pursue enforcement. *See* examples cited at *Hallstrom v. Tillamook County,* 493 U.S. 20, 30 (1989).

The *Westfall* amendment relates to no similar purpose regarding FTCA claims, but relates to cases originally *not* filed under the FTCA. Not one shred of related Congressional debate suggests consideration of a case originally brought against the federal government under the FTCA, yet it is for the latter purpose the Acting Solicitor General seeks to use the *Westfall* amendment.[13]

Indeed, the *Westfall* amendment incorporates a practical approach to these matters, not a hypertechnical one. Section 6(d)(5)(A) provides the claim shall be deemed timely presented if the date the underlying civil suit was *commenced* was such that "the claim would have been timely." Congress thereby recognized the practical effect of a civil suit filing [even in state court] against the person of a federal employee as tantamount to notifying

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[13] Moreover, section 6(d)(5) only speaks of "failure first to *present* a claim pursuant to section 2675(a)" 102 Stat. 4565, (emphasis added) not of failure to *exhaust* section 2675(a) procedures prior to filing suit. Of course Mr. McNeil both presented, and exhausted (by July 21, 1989).

the federal government for FTCA "jurisdictional" purposes.[14] Such recognition supports the view that Congress intended a practical, door-opening approach to claimants seeking to bring suits for tort actions involving federal employees; the claimant was to receive full benefit of timely, but incorrect, court filings, even if the wrong *party* was sued. Congressional history of the *Westfall* amendment contains absolutely no suggestion that suits originally brought against the federal government were considered at all. Contrast explicit Congressional consideration of the balance as discussed in *Hallstrom v. Tillamook County,* 493 U.S. 20, at 30 (1989).

Moreover, the word "commence" obviously and plainly refers to the date of filing the civil suit. Yet 2675(a) uses a different word: "instituted."

II. Commence and Institute are not Identical Terms: Examination of both Congressional and Presidential use of the Terms Demonstrates a Narrow – but Significant Difference

In the *Westfall* amendment, as well as many other instances, Congress uses these two words even in the same statutes in different senses. Congress normally appears to employ the word "commence" with a single point reference. However, "institute" is frequently used

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[14] If anything about section 2675 is "jurisdictional" it is the filing of the administrative claim – not the completion of the administrative process which can be infected by badly drafted agency letters. *See, Jerves v. United States,* 966 F.2d 517 (9th Cir. 1992) at 520 (which held a settlement offer of $15,000 on a $250,000 claim not a final denial letter) and cases cited, esp. *Dyniewicz v. United States,* 742 F.2d 484, 486 (9th Cir. 1984) (sum certain denial letter defective, failed to state must sue within 6 months of mailing).

in a manner that contemplates a multiplicity of beginning points or actions as well as in relationship to the carrying out of processes.

A. Some of the Examples Cited by The Acting Solicitor General Illustrate the Difference.

The Acting Solicitor General's brief at 19 cites 25 U.S.C. sec. 640d-17(c) as proof the terms are synonymous. The text actually illustrates the opposite. For example:

> "Either tribe may *institute* such further original, ancillary, or supplementary actions against the other tribe as may be necessary or desirable to insure the quiet and peaceful enjoyment of the reservation lands . . . and to fully accomplish all objects and purposes of this subchapter. Such actions may be *commenced* in the District Court. . . . "

Commenced obviously relates to a single, and particular date of filing for each action; institute refers to the plural "actions" which may be one or more "further original, ancillary or supplementary actions."

Similarly, 19 U.S.C. section 1641(d)(4), also uses the words with different senses:

> "[N]o proceeding . . . shall be *commenced* unless such proceeding is *instituted* by the appropriate service of written notice . . . except that if the alleged violation consists of fraud, the 5-year period of limitation shall *commence* running from the time such alleged violation was discovered."

Both uses of commenced appear to refer to a single date, one refers to filing, the other to the date fraud is discovered; instituted refers to a process of service of written notice – a process that includes both actual serving and a return of service.

Similarly 19 U.S.C. section 1621 states:

> "No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be *instituted* unless such suit or action is *commenced* within five years. . . . "

When a single, particular, suit is referenced, it is "commenced;" when either of "suit" or "action" (or the process of litigation), the reference is "instituted."

Perhaps the best example is 29 U.S.C. Section 256 which states:

> "[A]n action shall be considered to be *commenced* on the date when the complaint is filed; except that in the case of a collective or class action *instituted* . . . it shall be considered to be *commenced* in the case of any individual claimant – (a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or (b) if such written consent was not so filed or if his name did not so appear – on the subsequent date on which such written consent is filed in the court . . . "

Section 256 clearly contemplates actions being "instituted" that have not yet "commenced" with respect to particular plaintiffs, and the "institution" may refer to a host of plaintiffs each of whose actions may *commence* on different dates. Both sections 256 and 1641(d)(4) require actions beyond (and subsequent to) the court filing before the action fully *commences*.

B. Presidential Messages to Congress Use the Word "Institute" to refer to a Process.

Each of Presidents Eisenhower, Johnson, and Carter transmitted Messages to Congress with the word institute employed to refer to processes, not a specific date of beginning.

> "[T]he Assistant Secretaries of Defense will provide the Secretary with a continuing review of the programs of the defense Establishment and help him *institute* major improvements in their execution." 5 USCA Reorg. Plan 6, 1953, Message of April 30, 1953.
>
> "Upon the taking effect of the reorganization plan, the National Science Foundation will *institute* such new arrangements, in lieu of the divisional committees now required by law, as it deems appropriate. Such new arrangements may include the establishment of committees. . . . " 5 U.S.C.A. Reorg. Plan 5, 1965, Message of May 27, 1965.
>
> "I am taking the following actions to: *Institute* for domestic and economic issues, a system similar to the Presidential Review Memorandum process currently used for National Security issues." 5 U.S.C.A. Reorg. Plan 1, 1977. Message of July 15, 1977. "[I]t [Congress] directed me in title III of the 1978 development assistance authorization act, to *institute* a strengthened system of coordination of U.S. economic policies affecting the developing countries. . . . " 5 U.S.C.A. Reorg. Plan 2, 1979, Message of April 10, 1979. (emphasis added in each case)

C. Congress Also Often Has Used "Institute" to Refer to Matters that Transcend a Single Point in Time: Such Uses are Consistent with Exhaustion After Court Filing

> "[T]he Secretary of Defense shall, upon recommendation of the Board of Regents, *institute* actions necessary to ensure the maximum number of first-year enrollments in the University. . . . " 10 U.S.C.A. sec. 2112(b) (last amended Dec. 12, 1980)
>
> "[T]he Board of Governors of the Federal Reserve System shall ascertain that the regulations prescribed by it are not being complied with, said board is authorized and empowered to *institute* an investigation of the matter and to send for persons and papers, subpoena witnesses, and administer oaths . . . " 12 U.S.C.A. sec. 603 (last amended 1935)
>
> "On becoming final, the Commission deficiency order may – (A) require the contract market to – (i) *institute* appropriate improvements in its trade monitoring system necessary to correct the deficiencies noted therein . . . " 7 U.S.C.A. Sec. 12e(b)(3) (enacted in 1922)
>
> "[T]he Federal Government should *institute* systems for determining pay of its General Schedule employees under which the linkage between their performance and their pay will be strengthened. . . . " Pub. L. 101-509, sec. 529(a)(1) (enacted 1990)

The point is not that "commence" and "institute" cannot mean the same thing, they can, but they often don't, and do not in the matter at hand.[13] In the case at bar, it is far more consistent with Congressional purpose in enacting the FTCA to construe institute *not* narrowly to refer to a single point in time, but to refer to the process

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[13] Indeed, Congress in many statutes has directed a federal agency "to request the Attorney General of the United States to *institute* a civil action. . . . " 16 U.S.C.A. sec. 3373(c); *See also,* 16 U.S.C.A. sec. 1540(a)(1) Such references obviously reference multiple points in time, at a minimum the decision of the Attorney General to sue, and the actual commencement by filing.

of litigation – which is consistent with the views of those circuits that permit suits to proceed so long as no substantial progress has occurred before the administrative process has been exhausted.

The Acting Solicitor General's argument amounts to a request this court construe Congress's action enacting one statutory section opening the doors of federal courts by permitting an additional 60 days for first *presenting* an administrative claim in an unrelated class of cases, to imply Congress's intent 22 years earlier was to close the courtroom doors by a different statutory section, 28 U.S.C. section 2675, a section neither quoted, nor discussed by the 1988 House Committee Report. The argument stretches credulity, and ignores both the text of the 1988 amendment as enacted, as well as the legislative history of that amendment.[14]

Both text and legislative history of the *Westfall* amendment reiterate the overall purpose of the FTCA of opening courtroom doors, not shutting them. Section 2 Findings and Purposes, (a)(2) stated: "The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees *in the same manner* in which the common law historically has recognized the responsibility of any

[14] "We have on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress's clear intent, as in the context of the 'sweeping language' of the Federal Tort Claims Act, *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951), *see, e.g. id.*, at 554-555, *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 383 (1949)" *United States v. Nordic Village*, 112 S.Ct. 1011, 1014 (1992).

employer for torts committed by its employees within the scope of their employment."[15] (emphasis added)

III. Mr. McNeil's August 7, 1989 Letter Adequately Set Forth the Basis of His Suit: He Asked to "Properly Commence" the Litigation, and Thus Made a Proper Rule 15(d) Pleading Sufficient to Correct Any Prematurity in the Initial Filing and to Reinstitute the Action.

Mr. McNeil's letter of August 7, 1989 (Jt. App. 10) properly construed should be considered an adequate

[15] Pub. Law 100-694, 102 Stat. 4563, Nov. 18, 1988. (100th Congress). (emphasis added) *See also*, Pet. Brief, section I, B & C, pp. 15-25, esp. nn. 14, and 16, as well as Senate Report No. 1196, quoted at p. 14. The stated purpose was to protect Federal employees from personal liability, while providing persons injured with an appropriate remedy against the United States. Pub. Law 100-694, Sec. 2 (b), 102 Stat. 4564.

The legislative history contains no intimations of intended restrictions on rights of suitors, quite the contrary. Rep. Moorehead stated the measure "in no way . . . infringe(s) or diminish(es) any legal rights of the individual." Congressional Record, House, 100th Cong. 2nd Sess. H 4719, June 27, 1988. Rep. Frank described the bill as "a status quo ante bill" (Id.) that simply restores the situation prior to this court's *Westfall* decision. Not a member of the House or Senate expressed any other purpose; indeed the measure passed both houses with virtually no discussion and overwhelming legislative support. See, Senator Grassley's description of administration, public employee union, and bipartisan legislative support. Congressional Record, Senate, 100th Cong. 2nd Sess. S15214, October 7, 1988; *See also*, Congressional Record, House, 100th Cong. 2nd Sess. H 10678, October 20, 1988, and H 4804, June 28, 1988, and Congressional Record, Senate, 100th Cong. 2nd Sess. S 16375, October 14, 1988.

filing for either restarting or commencing a new complaint. (As Judge Ripple stated.)

The government contends that a Rule 15(d) pleading may never "commence" or "institute" an action. This position is inconsistent with the Federal Rules of Civil Procedure and this Court's decisions.

Rule 15(d) was amended in 1963 to add that supplemental pleadings may be accepted "even though the original pleading is defective in its statement of a claim for relief or defense." This sentence was added to resolve a conflict in the circuits which had developed *over the precise issue presented by this case* – whether a plaintiff who had filed a defective complaint which failed to state a cause of action could correct the defect by filing supplemental pleadings, without going through the formality of withdrawing the entire case and refiling it. Before 1963, the federal courts were divided on the issue of how to correct such defects when subsequent events made the cause of action ripe.

Some courts adhered to the notion that defective filings must be dismissed without prejudice,[16] other courts "felt that requiring plaintiff to go through the needless formality and expense of instituting a new action when events occurring after the original filing indicated he had a right to relief was inconsistent with the federal rules."[17] 6A Wright & Miller, *Federal Practice*

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[16] *See e.g. LaSalle Nat. Bank v. 222 East Chestnut St. Corp.*, 267 F.2d 247 (7th Cir.), cert. denied, 361 U.S. 836 (1959); *Bonner v. Elizabeth Arden, Inc.*, 177 F.2d 703 (2nd Cir. 1949).

[17] *See, e.g. U.S. for Use of Atkins v. Reiten*, 313 F.2d 673 (9th Cir. 1963); *Camilla Cotton Oil Co. v. Spencer Kellogg & Sons, Inc.*, 257 F.2d 162, 167 (5th Cir. 1958); *U.S. v. Russell*, 241 F.2d 879 (1st Cir. 1957).

and Procedure. Sec. 1505 at 190 (2nd Ed. 1990). The 1963 amendment resolved this conflict by allowing courts to entertain the action. *Id.* at 190-191.

The 1963 Advisory Committee Notes leave no uncertainty as to the intention of the drafters:

> [S]ome cases, opposed by other cases and criticized by the commentators, have taken the rigid and formalistic view that where the original complaint fails to state a claim upon which relief can be granted, leave to serve a supplemental complaint must be denied. Thus plaintiffs have sometimes been needlessly remitted to the difficulties of commencing a new action even though the events occurring after the commencement of the original action have made clear the right to relief. (citations omitted)

Thus the 1963 amendment to Rule 15(d) was passed to eliminate the necessity of withdrawing a defective complaint and resubmitting another.

Since Rule 15(d) was amended, this Court has held that a supplemental complaint is sufficient to cure a complaint which was filed before the plaintiff had exhausted his administrative remedies, even where administrative filing was a non-waivable jurisdictional requirement. In *Mathews v. Diaz*, 426 U.S. 67, 75 (1976) the plaintiff had joined an action challenging the constitutionality of certain provisions of the Social Security Act, before he had properly exhausted (or even filed for) administrative remedies, as required by the statute. A unanimous court relied on Rule 15(d) and held that a

supplemental complaint[18] would be sufficient to cure the defect.

The government attempts to distinguish *Diaz* by arguing that exhaustion of administrative remedies is not a prerequisite to *filing* suit under the Social Security Act ("SSA"). Sol.Gen.Br. 16-17, n.10. This claim lacks merit. The clear language of section 405(g) states that a plaintiff may obtain review in a district court through an action "commenced within 60 days" after mailing of notice of a final decision by the secretary. Section 2675 is quite similar except for "instituted." However, on the interpretation of "instituted" suggested by the government, the structures are identical; any complaint filed before administrative remedies are exhausted under the SSA or FTCA is premature. Yet although the court in *Diaz* stated in unambiguous terms that filing of an application under the SSA is a "nonwaivable condition of jurisdiction" 426 U.S. at 75 (citing *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975)) the action was permitted.

Without analyzing the language, history, or case law behind Rule 15(d), the government states that, in every instance, it is the original complaint, not the Rule 15(d) supplemental complaint, which serves to commence the

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[18] In fact Espinosa never formally supplemented the complaint; it sufficed that he "promptly brought" the fact of his filing the administrative request to the attention of the district court. 426 U.S. 73. Surely the fact of exhaustion was comparably demonstrated in the instant record by the July 21, 1989 HHS denial letter, Jt. App. 12-13, and the passage of six months from the January 17, 1989 filing of a claim for damages. Jt. App. 11. *See also, Security Ins. Co. v. United States for Use of Haydis*, 338 F.2d 444 (9th Cir. 1964) (premature filing corrected by filing supplemental complaint under Rule 15(d)).

action. Sol.Gen.Br., p. 12, n.4. The logical flaw with the government's position is that the government cannot explain when a Rule 15(d) action is commenced. If such an action is not commenced on the filing of a premature or defective complaint, as surely it cannot be, the only possible interpretation is that it is commenced at the time the curative supplemental complaint is filed. In the present case the August 7th letter complied with all of the requirements of Rule 15(d), including identification of a sum certain, its denial (hence presentation and exhaustion), and a basic allegation of the nature of the complaint, Jt. App. 10.[19]

The fact that Mr. McNeil lacked legal training to characterize this filing as a Rule 15(d) supplemental complaint does not preclude this Court from construing it as one. In analyzing *pro se* filings, a court must begin with the proposition that the, "pro se document is to be liberally construed." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). *Pro se* pleadings "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). See also, *Hughes v. Rowe*, 449 U.S. 5, 10 (1980).[20]

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[19] Alternatively, if the August letter was not a supplement to a prior defective complaint, the Court should find that the August 7th letter is a complaint which properly commenced the action. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984) does not contradict petitioner's position, for that case simply held that mailing the right to sue letter received from the agency was not sufficient to serve as a complaint because it did not provide a short and clear statement of the claim for relief. Id. at 149, n.3.

[20] The seventh circuit majority refused to consider this question. Jt. App. 30. Judge Ripple, the only judge to consider the matter, in dissent points out that the August 7th letter *itself*,

IV. *Hallstrom v. Tillamook County* is Inapposite

The government's almost exclusive reliance on *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989) is misplaced. Unlike the FTCA, which was enacted to give a cause of action to aggrieved individuals, the citizen provisions of RCRA do not allow individuals to recover damages.[21] Instead, the RCRA notice provisions, like those of other environmental statutes analyzed in *Hallstrom*, only allows citizens acting as "private attorney generals" to attempt to get the government to act against the polluter. The Congressional purpose of stimulating governmental entities to take the lead in enforcement efforts would be seriously disserved by eliminating the 60 day notice period. Public rights are critically at issue. Holding a private attorney general seeking to vindicate the public interest to a higher standard of conduct that an individual seeking primarily to vindicate that individual's own

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a pro se pleading, asks the court to properly commence the litigation in light of plaintiff's filing, Jt. App. 31. In the court of appeals Mr. McNeil raised the issue in Appellant's Brief (by counsel) p. 7, and the government responded in the Supplemental Government Brief 4 (sic 3)-5. Despite the majority's conclusion in the seventh circuit that the issue was not adequately raised, the government does not appear to pursue this argument in this Court and does not object to this Court's consideration of whether the August 7th letter was a proper and adequate Rule 15(d) supplemental complaint. Sol.Gen.Br. 7, n.3. *See, Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979) (state procedural default, suit held in abeyance until respondent complied with statutory notice mandate).

[21] Most of the environmental statutes considered in *Hallstrom* authorize other types of remedies. See, 42 U.S.C. sec. 6972(a) (injunction, clean up orders, criminal or civil penalties). Attorneys fees and costs are also potentially recoverable. 42 U.S.C. sec. 6972(e).

rights makes practical and policy sense. Conversely, deprivation of an individual's right to sue because of a technical, non-substantive mistake in filing makes no sense, particularly when that individual has the unilateral right to reject any offer the federal government might make during the six month period. Additional administrative costs of taking extra steps to assert a cause of action pale by comparison with a rule that extinguishes that cause of action. *Cf. Chevron Oil Co. v. Huson*, 404 U.S. 97, 108 (1971).

Petitioner does not dispute any of the purposes discussed by the government brief at 19-21.[22] However, Petitioner accomplished each such purpose long before any actual judicial action on his case – the agency refused to make any settlement offer, but had an opportunity to investigate. Moreover, Petitioner not only thought his initial claim had been rejected, but gave the agency a second chance in July to settle, an opportunity the agency declined to employ.[23]

Neither plaintiffs who are unaware of procedural requirements nor plaintiffs who in good faith believe they have complied with procedural requirements can possibly be deterred by such requirements from filing suits. In

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[22] Petitioner does contest the characterization at Sol.Gen.Br. p. 22 that 2675(a) *requires* by clear terms presentment of an administrative claim *prior* to filing suit. Rarely do *clear terms* generate conflicts in the circuits for this court's resolution. None of "filed suit," "requires," "prior," or "presentment" appears in section 2675(a).

[23] The government suggests doubt about the complete destruction of Mr. McNeil's cause of action at Sol.Gen.Br. 24-25. The court of appeal's decision is unambiguous. "It is too late to file another [complaint]." Jt. App. 27.

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the end any interest in judicial economy supported by the rule advanced by the government is ephemeral; the government's rule will only promote additional labor for the judicial system for actions that can be refiled, and achieve but one economy in other cases. The treasury will be protected, both against meritorious and nonmeritorious claimants – by a rule which has nothing to do with the merits of their claims. This court should not command such a harsh result, for neither expressed congressional text nor policy commands such results for FTCA actions. The government requests a special tort claims defense for it alone, such claims were rejected by Congress in 1949 (Pet. Br. 26, 31-2); that rejection should stand.

CONCLUSION

Mr. McNeil obviously "honored" the Congressional demand of an administrative filing (Sol.Gen.Br. p. 9); indeed, he twice honored it, and informed each court below, the district court and the court of appeals (repeatedly) that he had honored it. Mr. McNeil deserves better than Ralph Ellison's, *Invisible Man* "invisible, understand, simply because people refuse to [hear] me. . . . It is . . . often . . . wearing on the nerves . . . you doubt if you really exist." *In re Carlos P.*, 78 Misc.2d 851, 358 N.Y.S.2d 608, 609 (N.Y. Fam. Ct. 1974). His case should be heard so that the extremely serious allegations he raises can be decided on the merits.

Respectfully submitted,

ALLEN E. SHOENBERGER
Court Appointed Attorney
for the Petitioner

APPENDIX A

Mr. McNeil's Initial Pro Se Brief in the seventh circuit stated:

"Before this action was filed, the government was properly served in writing to the appropriate federal agency within the two years after such claim accrues. Chief Counsel, Thomas Scarlett from the office of the Secretary, Department of Health & Human Services, replied to my administrative claim, on January 24, 1989, the claim was forward (sic) to PHS claim office and the claim was assigned to Public Health Services Royce Rich as claim officer's (sic), to investigate and put value on said claim.

However, on February 9, 1989 the Information officer's (sic) one Ms. Nancy Oleksa forward (sic) her finding to both Royce Rich the claim officer's (sic) of PHS and plaintiff McNeil which clearly states, that no such experiment were (sic) being conducted . . . Therefore, in accordingly with Cheif (sic) Counsel, Thomas Scarlett letter of January 24, 1989 plaintiff McNeil had been given permission to file his lawsuit since all concern (sic) parties are fully aware that, fraudulent concealment of information from ('the government') is no grounds for tolling a claim.

On March 6, 1989 plaintiff McNeil filed his complaint with attached documents concerning his permission to suit (sic), however, plaintiff was not allowed to process until April 20, 1990. Plaintiff (sic) motion for leave to file in forma pauperis was denied as moot since plaintiff paid the filing fee May 9, 1989. The defendant was served accordingly." (pp. 1-2)

"All concern (sic) parties fully agree that before one may file suit under Federal Tort Claims Act, one must present written notice of claim to the implicated agency in order that there might be meaningful opportunity to resolve matter without necessity of judicial intervention, which is clearly what was done in the case at bar." (p. 3)

"The government was properly served in writing to the appropriate federal agency on January 17, 1989." (p. 6)

"Clearly McNeil's administrative claim was timely and properly filed to the right agency, before the filing of McNeil (sic) Federal Tort Claims Act (sic), in the district court." (p. 6)

"On May 9, 1989 plaintiff McNeil paid his filing fee with a check the sum of $120.00, and the check was stamped paid May 18, 1989. To the clerk of said district court, however the clerk docket sheet reflect (sic) that the check was recieved (sic) April 15, 1990, this is clearly an error. (see exhibit 1-C attached copy of said check)." (p. 7)

"Sometime in late June of 1989, plaintiff McNeil was send (sic) a form #95 to be fill (sic) out and sent back to Mr. Timothy M. White, Chief Litigation Branch Business and Administrative Law Division. Now remember February 9, 1989 McNeil received (sic) a letter from Ms. Nancy Oleksa the office of Health Affairs, no such project exist. (sic) (see Exhibit 1-D letter dated July 21, 1989, from Timothy M. White,) this is the second denial of my claim within a seven (7) months, had plaintiff waited his first denial of six (6) months would have ran (sic) the limitation period. That is what you call damn (sic) if you do and damn (sic) if you don't." (p. 7)

The pro se reply brief filed in the seventh circuit stated:

"On January 17, 1989 plaintiff filed his administrative claim which provided sufficient information to enable all concern (sic) parties to properly address and put value on the claim attached to the administrative claim was a second FOIA request the first filed November 16, 1988.

On January 24, 1989 plaintiff receive (sic) a letter of acknowledgement from Mr. Thomas Scarlett, Chief Counsel with a filed (sic) number, F 88-35196 which stated as follows:

Re: F 88-35196
Mr. McNeil

I am sending your January 17, letter requesting damages to Arthur Simon, the PHS claims officer. It will be treated as an administrative claim. *If it is denied, you will have to file a lawsuit.*

This letter clearly gave plaintiff permission to file suit, if his claim is denied. Also in the CC. their (sic) is an acknowledgement of my second FOIA request.

CC: Arthur Simon (w/enclosure)
HFI-35 (Deighton; See FOIA letter)

. . . .

Exhibit (b) the February 9, 1989 letter was a written notice that no such project exist. . . . Clearly that was a final decision of the claim." (p. 2-3)

"Plaintiff McNeil has written documents which cearly (sic) establish that plaintiff filed his administrative claim on January 17, 1989, letter of acknowlegement from Mr. Thomas Scarlett Chief Counsel, the same letter also

stated that if the claim is denied, you will have to file a lawsuit, the letter dated January 24, 1989." (p. 5)

"Plaintiff originally commenced his action by filing his administrative claim to the Department of Health and Human Services on January 17, 1989." (p. 6)

"Plaintiff paid his filing fee May 9, 1989, the check was made out to the court clerk and mailed with case number. The sum of 120.00, it was return (sic) to the bank May 18, 1989 as cashed." (p. 6)

"Also Ms. Nancy Oleksa states, she has no other person to check with, that there are no files on this project, this was a final denial of plaintiff's claim.

. . . .

. . . .

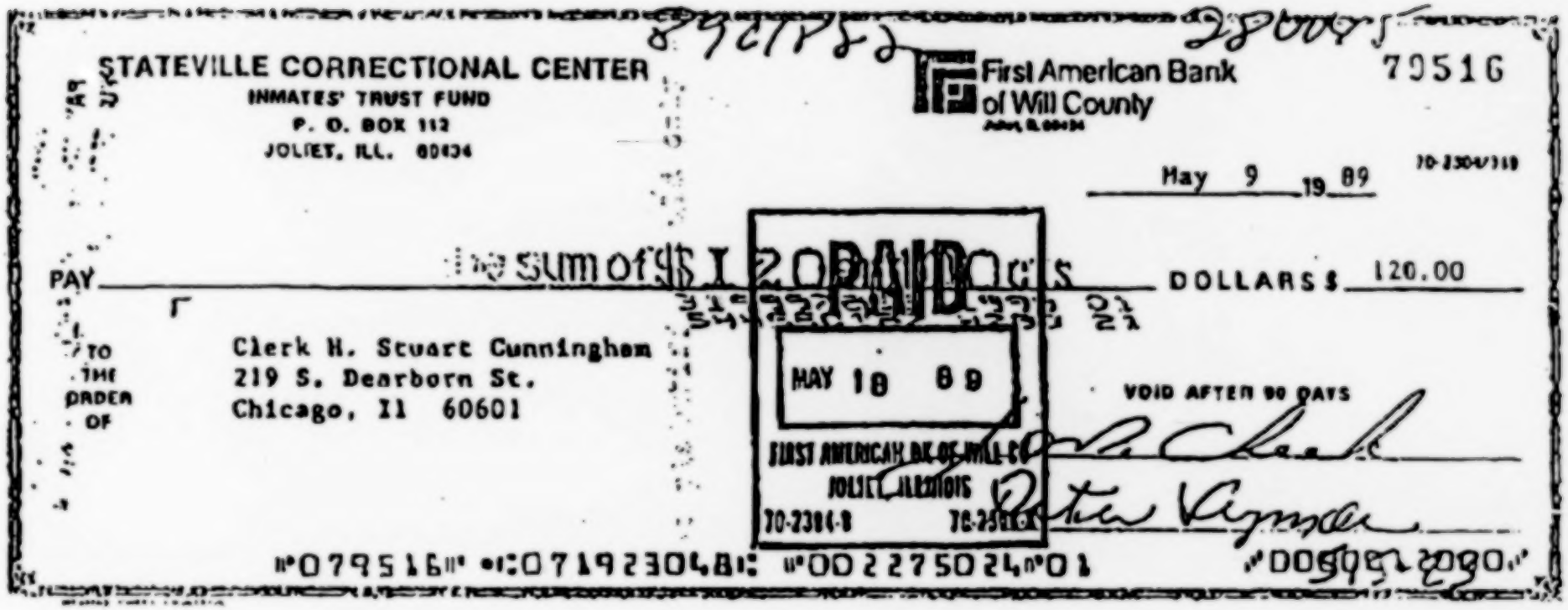
The only issue for review is subject matter jurisdiction which has not been properly address (sic) concerning the three (3) exhibits.

1. The January 24, 1989 letter which acknowledge plaintiff administrative claim date as January 17, 1989.

2. The reply letter from Ms. Nance Oleksa of February 9, 1989 and comments (sic) a final decision on the claim.

3. The January 24, 1989 letter which gave plaintiff permission to file his lawsuit." (p. 8)

APPENDIX B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PAY Sum of $120 and 00 cts DOLLARS $ 120.00

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Clerk H. Stuart Cunningham
219 S. Dearborn St.
Chicago, Il 60601

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FIRST AMERICAN BK OF WILL CO
JOLIET, ILLINOIS

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